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Supreme Court of the United States

October Term, 1944

No. 210

HARRY M. KOHN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF

Opinion Below

The petitioner was convicted of the crime of SENDING LETTERS WITH INTENT THEREBY TO CAUSE ANNOYANCE (Penal Law, § 551) in the Court of Special Sessions of the City of New York, New York County (WIEBOLDT, NORTHRUP and PAIGE, JJ.) (54-5, 617-8)[1]. There was no opinion handed down by the trial court.

The conviction was appealed by petitioner and was unanimously affirmed, with modification of sentence and without opinion, by the Appellate Division of the Supreme Court of the State of New York, First Department (266 App. Div. 995). On further appeal by the petitioner to the Court of Appeals of the State of New York, the judgment of conviction was unanimously affirmed, without opinion (292 N. Y. 597).

1. References are to folios in the printed record on appeal to Court of Appeals of the State of New York.

Jurisdiction

This being an application for a writ of certiorari (Petition, p. 1) and not an appeal, the jurisdiction of this Court must necessarily be invoked under section 237 (b) of the Judicial Code, as amended [28 U. S. C. A., § 344 (b)] —despite petitioner's reference to subdivision (a) of that section (Petition, p. 5; Petitioner's Brief, p. 13).

Statute Involved

The petitioner was convicted of a violation of the following provision of section 551 of the Penal Law of the State of New York:

> "* * * any person who shall knowingly send or deliver or shall make and for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing with or without a name subscribed thereto or signed with a fictitious name or with any letter, mark or other designation, with intent thereby to cause annoyance to any person * * * is guilty of a misdemeanor."

Summary of Facts

The petitioner—operating a private detective agency—was engaged in locating debtors and collecting small claims. He devised a scheme whereby, at the cost of a postage stamp, he could compel persons having information as to the whereabouts of debtors to communicate with him simply to relieve the fear and anxiety induced by receipt of his vicious letters and cards.

Pursuant to this scheme the petitioner sent to any person who presumably knew where the debtor might be, a card or letter, a facsimile of which appears on page 3

of the Petition. It purported to come from an unnamed hospital, without a return address, and conveyed the impression that some relative or friend was hurt or ill. It stated, cryptically, "We are required to withhold identity of patient and institution". The recipient was urged to telephone "immediately". The given telephone number was the petitioner's unpublished number about which the telephone company could not give information.

When the shocked and frightened recipient telephoned, the petitioner pretended to be "Dr. Winch", or "Dr. Gordon" or "Dr. Burell" (96, 249-50, 316), and, continuing the deception, he extracted information as to the whereabouts of the debtor he was trying to locate.

The whole scheme was conceded by the petitioner to be a "ruse," and the cards were admittedly an essential device in the deceit and subterfuge practiced by him (186, 196). They were sent indiscriminately not only to debtors who were being sought, but to innocent dupes, unconnected save by mere acquaintance or relationship with the debtor.

Question Presented

The petitioner claims that the statute is unconstitutional, as repugnant to the Fourteenth Amendment to the Constitution of the United States, in that: (1) it is too vague and indefinite; and (2) it exceeds the police power of the State (Petition, p. 9).

It is the respondent's position: (1) that no constitutional or federal question was raised or drawn in the State courts; and (2) that the alleged constitutional question which the petitioner now seeks to raise is wholly without merit.

I

The constitutionality of the State statute was not drawn in question or presented for decision in the State courts, nor did they pass, expressly or by inference, on any such question.

No constitutional question was presented to the State courts, either at the trial of the case before the Court of Special Sessions of the City of New York or upon appeal to the Court of Appeals. It follows that this Court will not assume jurisdiction. [*Memphis Nat. Gas Co.* v. *Beeler* (1942) 315 U. S. 649; *Minnesota* v. *National Tea Co.* (1940) 309 U. S. 551; *Patterson* v. *Stanolind Oil & Gas Co.* (1939) 305 U. S. 376; *Honeyman* v. *Hanan* (1937) 300 U. S. 14; *Lynch* v. *People of New York ex rel. Pierson* (1934) 293 U. S. 52; *Southern Pac. Co.* v. *Arizona* (1919) 249 U. S. 472; *Montana ex rel. Haire* v. *Rice* (1907) 204 U. S. 291.]

A. No constitutional question was presented at the trial of the case

The petitioner seeks to convey the impression that he succeeded in presenting a constitutional question to the trial court by means of a motion to dismiss and by various objections to the evidence (Petition, pp. 4 and 5).

Such is not the fact. The motion to dismiss was extensively argued at the Bar, covering forty-one folios in the printed record, but no question as to the constitutionality of the statute (Penal Law, § 551) was suggested by counsel for the defendant (580-621). And, though the petitioner made objection to certain lines of testimony on the ground that it was without proper foundation or irrelevant to the issues, he made no effort to raise or even suggest a constitutional question, as he now attempts to do, in relation to the admission of such evidence.

B. No constitutional question was presented to or necessarily decided by the Court of Appeals

A mere reading of that portion of the petitioner's Court of Appeals brief cited at pages 6 to 8 of his Petition is sufficient to demonstrate that no constitutional question was necessarily presented thereby to the Court. The petitioner merely argued there that (Petition, p. 6): "*Unless* the statute is reasonably construed so as to exclude from its ambit the necessary and incidental annoyance in the carrying on of a lawful business * * * it would clearly be unconstitutional"; that "the same would be true *if* the test of what constitutes annoyance is the subjective reaction of the recipients of the cards * * *." (Italics supplied.) Thus, he summarized his argument (Petition, p. 8): "We contend that a construction which makes the test of intent to annoy the subjective reaction of the recipients of the cards destroys the degree of definiteness required of criminal statutes by the Federal Constitution."

The facts of the case, however, did not call for the suggested unconstitutional construction. Furthermore, the People, in opposing the appeal, did not advance any such interpretation or application of the law: the petitioner's guilt was sufficiently grounded on a very different theory of the scope and meaning of the statute. Thus, the People took the position that it was the petitioner's clear design and intent, as demonstrated by his planned course of conduct and the results he sought to achieve, to cause annoyance to the recipients of his letters. Such proof, the People argued, was ample to support the conviction, entirely apart from evidence of the "subjective reaction of the recipients" which was merely corroborative of the petitioner's design (Respondent's Brief in the Court of Appeals, pp. 9-15).

Nor was it necessary for the Court of Appeals to determine whether the statute could constitutionally be extended to cover a case of "necessary and incidental annoyances" in ordinary social or business intercourse. The validity of the statute was not exposed to question by reason of such a construction for the obvious reason that neither the facts of the case nor the argument of the People required any such construction.

The record, therefore, provides no reason for accepting the petitioner's strained hypothesis that the Court of Appeals must necessarily have construed the statute in the allegedly unconstitutional manner suggested by him. In truth, the constitutional question now urged was not actually decided by the Court of Appeals and the judgment rendered by that Court did not require decision on any such question.

It follows that this Court will not now assume jurisdiction of such question [See *Southwestern Bell Telephone Co.* v. *Oklahoma* (1938) 303 U. S. 206]. In the case cited, this Court observed (303 U. S. at pp. 212, 213):

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Lynch* v. *New York*, 293 U. S. 52, 54."

II

The statute is specific and definite and as applied to the activity of petitioner is a reasonable and proper exercise of the State's police power.

A. The statute is not vague and indefinite

The statute in question (Penal Law, § 551) uses words of common and clear import to define the conduct penalized. There is nothing complex or obtuse either in the words or the grammar. So far as it relates to the instant case, it provides simply and clearly that "any person who shall knowingly send * * * any letter, postal card or writing * * * signed with a fictitious name * * * with intent thereby to cause annoyance to any person * * * is guilty of a misdemeanor."

So simple and plain is the statute that analysis of its terms is unnecessary. It is, patently, "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." [See *Kay* v. *United States* (1938) 303 U. S. 1, 9; *Connally* v. *General Const. Co.* (1926) 269 U. S. 385, 391.] No man of common intelligence need guess at its meaning. The conduct penalized is "not beyond the ready comprehension either of persons affected by the act or of juries called upon to determine violations" [*United States* v. *Ragen* (1942) 314 U. S. 513, 524].

Petitioner's suggestion that "annoyance" as used in the statute is a word of unreasonable scope so vague and indefinite that it could encompass any slight disturbance of a tranquil mind is, obviously, not a corollary of the judgment convicting him. Beyond that, the suggestion is contrary to the construction of the statute by one State court which defined the term as "real annoyance and disturbance in the mind of the person affected," not "whimsical or capricious" or "trivial". [See *People* v. *Mikulski* (Mag. Ct. N. Y. C. 1914) 146 N. Y. Supp. 829, 833.] Only

when such annoyance is intended does the statute apply—as in the instant case where the petitioner caused his victims gnawing fear and anxiety, and even shock (419, 539). Therefore, "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness." [*Fox* v. *Washington* (1915) 236 U. S. 273, 277.]

B. The statute, as applied to the petitioner's conduct, is clearly within the police power of the State of New York [2]

At the outset, it may be observed that—unless the statute is clearly unconstitutional no matter what construction be given its terminology—the petitioner is confined to attacking its validity *as applied to his activities as disclosed by the record;* he is not entitled to the benefit of any fanciful construction which might conceivably render the statute invalid. [*Fox* v. *Washington* (1915) 236 U. S. 273, 277; *Baender* v. *Barnett* (1921) 255 U. S. 224, 225-226; *United States* v. *Kirby* (1868) 74 U. S. 482, 486.] As was observed in *Fox* v. *Washington, supra,* 236 U. S. 273, 277:

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; * * * and it is to be presumed that state laws will be construed in that way by the state courts."

Under the rule thus enunciated, there can be no conceivable doubt of the validity of the statute. As appears from the Summary of Facts, *supra,* pp. 2-3, it is apparent that the petitioner's actions were so vicious as

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2. It is to be noted that the petitioner makes no claim that the statute (Penal Law, § 551) infringes any constitutionally guaranteed freedom. The contention is simply that the legislation "does not fall within any of the well-recognized fields for exercise of the police power" (Petitioner's Brief, p. 17).

positively to cry out for the intervention of the State's police power. He deliberately and wantonly destroyed the peace of mind and imperiled the mental and physical health of innocent persons, who can look only to the State for protection unless they themselves are to take action which will lead to disturbance of the public peace.

No authority is cited by the petitioner which remotely suggests that conduct such as his is beyond the power of the State to prevent. On the contrary, the decisions of this Court firmly support the State's exercise of its police power to punish such reprehensible activity. [*Cf. Chaplinski* v. *New Hampshire* (1942) 315 U. S. 568; *Thornhill* v. *Alabama* (1940) 310 U. S. 88; *Gitlow* v. *New York* (1925) 268 U. S. 652; *Omacchevarria* v. *Idaho* (1918) 246 U. S. 343; *Barbier* v. *Connolly* (1885) 113 U. S. 27.]

The petitioner's suggestion (Brief, pp. 16-17) that New York alone has the particular form of statute now under consideration presents, of course, no legitimate ground of attack. The fact is, however, that analogous statutes have been enacted in other states. [*Cf.* Michigan Comp. Laws (1929) § 16814; Maine Rev. Stat. (1930) Ch. 129, § 22, p. 1549.]

III

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August, 1944.